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No. 91-903

Supreme Court, U.S.
FILED
JAN 14 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

GLADYS MURRAY, On Behalf of Herself
And All Others Similarly Situated
(and 27 Other Individuals),

Petitioners,

v.

STUCKEY'S, INC. and
PET INCORPORATED,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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I

Respondents concede that the three judge panel substituted its judgment of the facts for that of the trial court.

In their Brief (p. 6) Respondents concede that " . . . what the *duties and responsibilities* of the store managers were and how they spent their working time are clearly questions of fact." (emphasis supplied) Petitioners agree. On these subjects the District Court made findings of fact that:

"The *duties* of the 'manager' and 'hourly employee' were essentially the same" (Finding of Fact 17) (App. p. 27a). (emphasis supplied)

and

. . . the defendants have failed to sustain their burden of proof that such employees are exempt from the overtime provisions of the Fair Labor Standards Act (Finding of Fact 29) (App. p. 37a).

and

"With respect to Plaintiffs who received a weekly salary (managers), the defendants have failed to sustain their burden of proof that the primary *duty* of those employees was management . . . In essence, the evidence demonstrated that the 'managers' simply took orders and had little, if any, real involvement as managers" (Finding of Fact 28) (App. p. 36a). (emphasis supplied)

and

" . . . the court is persuaded that the 'managers' did not have management as a primary *duty*." (Finding of Fact 28) (App. p. 37a). (emphasis supplied)

Unless *all four* of those findings of fact are set aside as being clearly erroneous there can be no justification for the reversal by the three judge panel of the Eighth Circuit. Any *one* of those findings of fact absolutely precludes any ultimate finding that the so-called "managers" are exempt. The panel has clearly substituted its judgment of the facts for the judgment of the trial court.

II

None of the Findings of Fact of the trial court were clearly erroneous nor were they found by the panel to be clearly erroneous.

The four findings of fact (unless set aside as being clearly erroneous) that preclude any conclusion by the panel that the Respondents have carried their burden of proof as to the executive exemption are set forth at pages 6 and 7 of the Petition and again at page 2 of this Reply and need not be repeated again.

At pages 14 and 15 of their Brief Respondents contend "THE DISTRICT COURT'S RULINGS WERE CLEARLY ERRONEOUS". But they do not tell this Court, or Petitioners, which of the four crucial findings of fact listed in the Petition, and again in this Reply, are clearly erroneous or why any one of them might be clearly erroneous, let alone why all of them might be clearly erroneous.

As noted in Division I of this Reply, if *any one* of those findings of fact remain, it is clear that the executive exemption has not been proven by Defendants. Under any of the three tests for executive exemption, (i.e. the short test, the long test, or the sole charge exemption) the primary duty of the employer must be management. The trial court has made findings of fact that management was not the primary duty. (Finding of Fact 28) (App. p. 37a)

Those findings of fact are clearly and adequately supported by substantial evidence in the case. For example, each of the Plaintiffs who testified live, testified that their primary duty was *not* management of the store (See, e.g. Tr. Vol. 1, pp. 38-39 (Gladys Murray), p. 98 (Arbuckle), p. 203 (R. Renecker)). Additionally, a former

Regional Manager testified that there was not any real difference in the duties between the "managers" and the "manager's" spouse, who was an hourly employee (Roush dep. pp. 18-19). The Finding of Fact is further supported by substantial evidence that the so-called "managers" spent 75%, 80%, and up to 90% of their time performing non-exempt duties.

At best, from the perspective of Defendants, there was a conflict in the testimony presented by Plaintiffs and Defendants as to the "primary duties" of Plaintiffs (Petitioners herein). The trial court resolved that conflict and made findings that the primary duty of Plaintiffs was not management and that Defendants had not carried their burden of proof on this issue.

Unless Defendants carried their burden of proof on the "primary duty" issue, they cannot prevail on the executive exemption issue. The trial court found, as a fact, that:

1) The primary duty of Plaintiffs was *not* management,

   and

2) Defendants had failed to sustain their burden of proof that the primary duty was management.

III

The statement of the panel "that Respondents were entitled to have one designated exempt executive at each . . . facility" is legally erroneous and cannot be used as support for substituting the judgment of the three judge panel for that of the trial court.

At page 9 of their Brief Respondents contend that the three judge panel " . . . held as a matter of law, that

Respondents were entitled to have one designated exempt executive at each of their remotely located facilities."

The opinion of the panel does contain a statement similar to that (App. p. 10a). But that statement is clearly erroneous as a matter of law. That statement of the law by Respondents and by the Court flies in the face of 29 C.F.R. § 541.1 which requires among other things that the primary duty of the employee be management, that the employee be paid certain amounts and that the employee regularly supervise two or more employees. On that basis it is clear that *no one* at a given facility might qualify, for example:

1) If none was paid over $150.00 per week, or
2) If there were only one or two employees at a given location.

The three judge panel of the Eighth Circuit has clearly substituted its judgment of the facts on the "primary duty" issue for that of the trial court.

IV

Respondents' Brief misconceives the action of the three judge panel.

Respondents contend at page 3 of their Brief that " . . . the Eighth Circuit panel did not make factual findings on their own nor did they substitute their judgment of the facts for that of the District Court. . . . "

Similar assertions are made elsewhere in their Brief. These assertions are apparently made because Respondents do not recognize that what the Eighth Circuit Panel really did was to reverse, or alternatively to ignore, the findings of fact of the trial court under the guise of interpreting the regulations. As demonstrated above, a

finding of executive exemption cannot stand in the face of the four findings of fact set forth at pages 6 and 7 of the Petition and again at page 2 of this Reply.

The Eighth Circuit panel ignored those findings of fact. Respondents also choose to ignore those findings of fact. But those findings preclude any ultimate finding of executive exemption.

V

Respondents' Brief misconceives, mischaracterizes, ignores, or misconstrues the Petition for Writ of Certiorari.

A. Respondents admit in their Brief (p. 3) " . . . that exemptions are to be narrowly construed and the employer is held to a strict burden of proof." Yet at page 5 of their Brief they contend that the " . . . EXEMPT OR NON-EXEMPT STATUS UNDER THE FLSA IS A QUESTION OF LAW". Of course, that status includes the fact question of "primary duty" on which Respondents admit they have a strict burden of proof. Obviously the trial court found against Respondents on that fact issue holding they did not meet their strict burden of proof. That obviously is not a question of law.

Respondents also ignore all of the recent decisions of the Fifth Circuit, the Third Circuit, and the Eleventh Circuit, cited and discussed at pages 11-14 of the Petition. Particularly noteworthy is the omission of any discussion of *Dalheim v. KDFW-TV*, 918 F.2d 1220 (5th Cir. 1990). In that case the court held, as noted at page 12 of the Petition, that the question of "primary" duty is based on inferences, which are reviewed for clear error. Only by ignoring *Dalheim, supra*, as Respondents have done, can they assert that is a question of law.

B. Respondents, in their Brief (p. 13) state that " . . . Petitioners' suggestion that equal treatment in the appellate process should not be afforded them (Respondents) just because of their employer status is entirely unfounded." But that simply is not what Petitioners said in their Petition for Writ of Certiorari. What Petitioners said was " . . . that the *same* standard of review should be applied by the Circuit Court when the worker wins in the trial court as when the employer wins in the trial court." (p. 8 of the Petition) (emphasis supplied)

C. At page 14 of their Brief, Respondents grab onto the statement of the Circuit Court (taken out of context) that:

> "the sole charge exception seems to be written for employees like these store managers . . . It is clear that Stuckey's store managers satisfy these sole charge standards." (Appendix, p. 15a).

Had Respondents' counsel read *Donovan v. Waffle House, Inc.*, 26 Wage and Hour Cases (BNA) 868 (N.D. Ga. 1983), cited by Respondents in their Circuit Court Brief and cited by the Circuit Court in its opinion, Counsel would have known that statement is indefensible and incorrect.

In *Waffle House, supra,* the court discussed the regulations (29 C.F.R. § 541.113) dealing with the sole charge exception and stated:

> " . . . the court takes judicial notice of the fact that this interpretation was first issued in 1949 when not only was the franchise restaurant industry not covered by the Act, but retail trade as a class was not covered."

Retail employees were not covered by the Act until 1961. A regulation written in 1949 could hardly have been

"written for employees like these store managers" who were not even covered by the Act until 1961.

D. At page 16 of their Brief Respondents state "Petitioners' argument amounts to nothing more than saying that an award to employees should never be reversed." Again, this statement misconceives the Petition for Writ of Certiorari. What Petitioners have said is that findings of fact by the trial court as to primary duty and the executive exemption should not be set aside or ignored. This is particularly true where the complaining party has the burden of proof. Nowhere in Respondents' Brief have they come to grips with the four findings of fact set forth at pages 6 and 7 of the Petition. Instead Respondents choose to ignore those findings of fact, as did the three judge panel.

E. At page 1 of their Brief Respondents state "The managers filed suit claiming they worked twenty-four (24) hours a day throughout their periods of employment." No such claim was made in the Complaint. The Complaint simply alleged that Gladys Murray was employed " . . . for work weeks longer than forty (40) hours per week" without paying overtime.

After discovery had begun, it became apparent that Plaintiffs might be entitled to pay for "on call" time and in compliance with their ethical obligations, Plaintiffs' counsel at trial did seek overtime pay for "on call" time. The trial court made findings of fact adverse to Plaintiffs on the issue of "on call" time. (Finding of Fact 39) (App. p. 41a) Plaintiffs accepted and did not contest those adverse findings of fact. Respondents should likewise accept and not contest the findings of fact adverse to them.

F. Respondents in their Brief (p. 16) chide Petitioners' counsel because " . . . they did not bother to read the First Circuit's *Burger King*[1] decision . . . " and for " . . . lack of diligence . . . " Perhaps some apology on this is in order, and Petitioners apologize to the Court for overlooking the First Circuit's *Burger King* case.

However, Petitioners counsel do contend they used reasonable diligence. Counsel conducted a Westlaw computer search of Wage and Hour cases in which reversal was mentioned in connection with the entitlement to the executive exemption. Fifty-four (54) cases were disclosed by Westlaw. *Burger King* was not among them. Each of those 54 cases was carefully checked by counsel for Petitioners prior to completion of their Petition.

Aside from that, the First Circuit's decision in *Burger King* affirmed the judgment of the trial court, except as to assistant managers who earned at least $250.00 per week.[2] As to those who earned at least $250.00 per week the First Circuit set aside the trial court's finding of fact because it was inconsistent with other findings of fact of the trial court. Except for the modification made herein, Petitioners stand on the statements made in the Petition.

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[1] *Donovan v. Burger King Corporation*, 672 F.2d 221 (1st Cir. 1982)

[2] Nearly all of the so-called "managers" who are Petitioners herein earned less than $250 per week. *Burger King* is also quite different on other facts. Perhaps the most notable is that the assistant managers supervised up to 25 other employees at any one time.

CONCLUSION

For the reasons stated in our Petition and in this Reply Brief, we respectfully submit, our Petition for a Writ of Certiorari should be granted.

DATED January 14, 1992.

Respectfully submitted,

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